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No. 03-107

Supreme Court, U.S.
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In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

BILLY JO LARA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF THOMAS LEE MORRIS, ELIZABETH S. MORRIS AND ROLAND J. MORRIS, SUPPORTING RESPONDENT

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INTEREST OF *AMICI*

Pursuant to Supreme Court Rule 37.2 *amici curiae* file this brief in support of Respondent.[1]

Thomas Lee Morris, now 20 years old, is an American Indian and is enrolled as a member of the Minnesota Chippewa Tribe, Leech Lake Reservation, Minnesota. He is not a member of the Confederated Salish & Kootenai Tribes, who are *amici* here, headquartered in Pablo, Montana, within the Flathead reservation. When he was 17 years old, he was cited with allegedly committing a crime under the Flathead Tribes' laws, and the Tribes have asserted jurisdiction to prosecute and punish him. Law and Order Code of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Chapter IV, Code of Tribal Offenses, Section H, Offenses Against Public Order, Health, and Decency, subsection H12, Traffic Offenses, at 45-46.[2]

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[1] Letters of consent to the filing of this Brief from counsel for the parties have been filed with the Clerk. No counsel for a party authored this brief in whole or in part. No person or entity, other than counsel for *Amici*, made a monetary contribution to the preparation and submission of this brief.

[2] The crime for which Thomas Morris has been charged in Flathead Tribal Court is speeding. While this particular accusation is not itself momentous, determining whether Congress can select nonmember Indians, and only Indians, for criminal prosecution in the courts of sovereigns which exclude them from full and equal rights of political participation on the ground of their ethnicity and which sovereigns and courts are unbounded by the Constitution is momentous indeed. Indeed, in a civil context, the Flathead Tribes' own Appellate Court recognized this, stating "[t]he exercise of tribal jurisdiction over non-Indians is replete with constitutional issues." *Middlemist, et al. v. Pablo, et al.*, 23 ILR 6141, 6143 n.5 (1996). If it is worth judicial

(Continued on following page)

Defending against this prosecution, he and his parents, Lisa and Roland Morris ("Morrises"), exhausted tribal remedies, then sought injunctive relief and a declaration of unconstitutionality of the 1990 amendments to §1301 of the Indian Civil Rights Act, Pub. L. No. 101-511, §8077 (1990), amending 25 U.S.C. §1301,[3] the sole source of the Tribes' authority to prosecute him, in a complaint filed in the United States District Court for the District of Montana. *Morris v. Tanner*, CV-99-82-M-DWM. Morrises challenged the ICRA amendments on grounds that they violate both the due process and equal protection components of the Fifth Amendment as well as the basic principle of separation of powers. The District Court dismissed the complaint without ruling on these issues, simply noting that Congress had enacted the 1990 amendments. (Unpublished Order, filed October 5, 1999.)

On appeal, the Ninth Circuit Court of Appeals, noting similarities between Morrises' case and *United States v. Enas*, 255 F.3d 662 (2001), *cert. den'd*, 534 U.S. 1115 (2002), invited the United States to submit an amicus curiae brief and present oral argument. The United States

resources to protect tribal sovereignty over civil traffic offenses within a reservation, *Confederated Tribes of the Colville Reservation v. Washington*, 938 F.2d 146, 148 (1991), Morrises submit the protection of individual rights from congressional acts based explicitly on racial grounds and consigning U.S. citizens to prosecution and punishment by non-constitutional tribunals is at least as important. *Duro v. Reina*, 495 U.S. 676 (1990)

[3] The 1990 ICRA amendments, at issue here, contained a sunset provision and lapsed after one year. After the passage of a few days, Congress re-enacted them permanently, Pub. L. No. 102-137, 105 Stat. 646 (1991). Hereinafter, they are referred to as the "ICRA amendments."

did so, arguing as it has here that the ICRA amendments represent only a political classification by Congress and therefore strict scrutiny analysis is not required because, it was claimed, only people – not necessarily Indians – who are enrolled members of a federally-recognized tribe were made subject to tribal criminal jurisdiction by the amendments.[4]

The Ninth Circuit, in an unpublished memorandum opinion, reversed and remanded to the District Court with instructions to decide the constitutional issues presented. Unpublished Memorandum Opinion, dated July 24, 2001. App. 4-11. Specifically, the Ninth Circuit directed the District Court to determine whether Congress made a racial classification in enacting the ICRA amendments in which it consigned only nonmember Indians to tribal criminal jurisdiction or a political classification. *Id.* at 10.

On remand, the United States intervened as a party defendant. The District Court again upheld the 1990 amendments, holding that Congress made only a political classification, requiring only a rational basis. *Morris v. Tanner*, ___ F. Supp. 2d ___, 2003 WL 22439854 (D. Mont.) decided October 28, 2003. This matter is now back on appeal to the Ninth Circuit. *Morris v. Tanner*, 03-35279.

[4] In its written submission to the Ninth Circuit and at oral argument one of the U.S. attorneys here, Mr. Richard A. Friedman, told the Ninth Circuit panel that the "fact" that non-Indians can and have been recognized as tribal members under tribal and federal rules proves this is merely a "political" classification. Because this claimed "fact" is neither factually nor legally correct, the United States later retracted this assertion in a letter to the court. App. 1.

The Morris family is representative of many American families whose members, or some of them, are Indian.[5]

[5] Roland Morris, Thomas' father, is also a member of the Minnesota Chippewa Tribe, Leech Lake Reservation, as are his four brothers and sisters, ranging in age from 16 to 10 years old. Elizabeth Morris, his mother, is not Indian, and is, consequently, ineligible for membership in any tribe. This means that for the very same offense Thomas allegedly committed, his mother would be tried in a state court, where, under Montana law she would have the right to a jury trial, and the jury would have to be seated in conformity with state and federal constitutional requirements. *Woirhaye v. Montana Fourth Judicial District Court*, 292 Mont. 185, 191, 972 P.2d 800, 803 (1998). In Thomas' case, by contrast, simply because he is an Indian, he does not have a right to a jury trial, the trial judge in his case, by tribal statute, must be a tribal member, (App. 13), and even if tribal law did allow a jury, only tribal members could be seated. *Id.* Moreover, again simply because of his race, Congress in the 1990 amendments subjected him to the court of a sovereign in which, because of his ethnicity – i.e., while he is Indian, he does not have sufficient "blood quantum" (see App. 12) to be a Flathead Indian – he cannot fully participate in the tribal political process which develops the law he purportedly must comply with. Thus, because he is ineligible for membership in the Flathead Tribes, he cannot hold tribal office or vote in tribal elections. Consequently, he has no right to participate in the political process by which the very Law and Order Code under which he is being prosecuted was developed and adopted.

This is not analogous to the situation of a non-resident of one state or local jurisdiction being subject to criminal prosecution in another. Most importantly, in every place in the United States other than those subject to the criminal jurisdiction of Indian Tribes, police, prosecutors and courts are bound by the minimum standards set by the Constitution. Thus, a North Dakota resident prosecuted in a Montana court has all the protections afforded him under the Constitution. Moreover, residency is the key factor in determining the right to participate fully and equally in the political process of the state and this, too, is limited by constitutional guarantees. *Saenz v. Roe*, 526 U.S. 489, 499-502 (1999). One's race, obviously, is a forbidden basis for allowing or prohibiting political participation. In the case of the 1990 amendments, nonmembers are excluded from full and equal rights of participating in the political process of the tribal sovereign precisely because of their race – in the case of non-Indians – or ethnicity – in the case of Indians

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Thomas Morris lives with his family in Ronan, Montana, within the Flathead reservation. The Morris family has lived there for more than 15 years, Mr. Morris running an upholstery business and Mrs. Morris working at a variety of jobs, including caring for five children and four minor grandchildren (who are also Indians but not Flathead Indians).

As noted, the Indian members of the Morris family are not members of the Flathead Tribes, nor are they eligible for membership because they lack the Flathead Indian "blood quantum" required. See Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, as Amended, Title I, Ch. 1, Part 1, requiring one-quarter "Salish or Kootenai blood" to be a tribal member (Section 2), and defining "Indian Blood," unless the context requires otherwise, as meaning "the blood of either or both the Kootenai or the Salish Tribes of the Flathead Reservation." App. 12. Consequently, they do not have the right to participate fully and equally in the political life of the Flathead Tribes. They simply live within the reservation just as the non-Indian population of about 18,000 lives there. (Congress opened the Flathead reservation, which it set aside using its Treaty Clause, Art. II, §2, cl. 2, and Property Clause, Art. IV, §3, cl. 2, powers in 1859 when it ratified the 1855 Treaty of Hellgate between the Flathead Tribes and the United States, 12 Stat. 975, to nonmember settlement in 1904 when it enacted the Flathead Allotment Act. Act of April 23, 1904, 33 Stat. 302.) The non-Indian population residing on the reservation, however, is

who are not eligible, because of the lack of the appropriate "blood quantum," for tribal membership.

free of the threat of tribal criminal prosecution, because of their race – i.e., they are not Indians. Only Indians who are on the reservation, because they live there, are visiting there, or are merely passing through, have that potential burden.[6] Also, like many American families, the Morrises travel. In the last three years, in their travels they have passed through the Blackfeet reservation in Northern Montana on their way to Canada; and through the Crow reservation in South Central Montana, the Wind River reservation in Wyoming and the Isleta reservation in New Mexico on a trip to Mexico.

Unlike any non-Indian travelers, while passing through these reservations the Morrises, with the

[6] Congress' enactment of the ICRA amendments created a unique situation perhaps implicating the fundamental right to travel. See *Saenz v. Roe*, 526 U.S. 489 (1999). For example, a Seminole Indian residing in Florida may well decide to visit Glacier National Park in northwest Montana. Unless he or she chooses the route very carefully, and chooses to take a circuitous route, that person will likely travel, by U.S. highway, either through the Blackfeet reservation or the Flathead reservation to get there. For the hour or so it takes to drive through one of these reservations, that person, if accused of a misdemeanor crime, would have to vindicate himself or herself in the tribal court, subject to all the local tribe's particular procedures, customs and laws. Since under the ICRA amendments the tribe would be exercising its inherent sovereign authority, this person would not have the protection of the Constitution. The only reason for this would be that person's race. If his or her spouse was accused of the same crime but, as in the Morrises' case, was not Indian, the spouse would be tried in a different court in which all constitutional rights were protected. The only distinction causing this would be the race of each individual. Aside from this explicit racial issue and the equal protection problem it raises, it is difficult to see how such a U.S. citizen's right to travel would not be abridged if whenever he or she entered an Indian reservation Congress subjected them to the power of a non-constitutional sovereign.

exception of Lisa Morris, would be subject to the local tribe's criminal jurisdiction under the ICRA amendments.

STATEMENT

1. In *Duro v. Reina*, 495 U.S. 676 (1990), the Court applied the analysis and holding it had reached previously in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) to nonmember Indians. Since there is no principled difference between the situation of nonmember non-Indians and nonmember Indians when confronted with the power of a tribal government, the Court found tribes lack the inherent sovereign power to prosecute them for misdemeanor crimes they allegedly committed on a reservation. Substituting governmental-ease and expediency for the interests of individuals, the U.S. and various tribes had argued against such a holding on the ground that it would create a "jurisdictional gap." The Court declined to subject U.S. citizens to a non-constitutional sovereign that excludes them from its political processes because of their race or ethnicity for this reason. "The exercise of criminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe, and involves a far more direct intrusion on personal liberties." *Duro v. Reina*, 495 U.S. 676, 110 S.Ct. 2053, 2061 (1990). The Court further noted:

> "Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States. We hesitate to adopt a view of tribal sovereignty that would single out another group of citizens,

nonmember Indians, for trial by political bodies that do not include them. As full citizens, Indians share in the territorial and political sovereignty of the United States. The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members. Indians like all other citizens share allegiance to the overriding sovereign, the United States. A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority.

The special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate. While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often "subordinate to the political branches of tribal governments," and their legal methods may depend on "unspoken practices and norms." Cohen 334-335. It is significant that the Bill of Rights does not apply to Indian tribal governments. *Talton v. Mayes*, 163 U.S. 376, 16 S.Ct. 986, 41 L.Ed. 196 (1896). The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts."

Duro v. Reina, 495 U.S. 676, 110 S.Ct. 2053, 2064 (1990).

Consequently, in *Duro*, the Court held:

"[i]n the area of criminal enforcement . . . tribal power does not extend beyond internal relations among members. Petitioner is not a member of

the Pima-Maricopa Tribe and is not now eligible to become one. Neither he nor other members of his Tribe may vote, hold office, or serve on a jury under Pima-Maricopa authority. Cf. *Oliphant*, 435 U.S., at 194, and n. 4, 98 S.Ct., at 1013, and n. 4. For purposes of criminal jurisdiction, petitioner's relations with this Tribe are the same as the non-Indian's in *Oliphant*. We hold that the Tribe's powers over him are subject to the same limitations." *Duro v. Reina*, 495 U.S. 676, 110 S.Ct. 2053, 2061 (1990).

To be sure, the Court noted the possibility that a "jurisdictional gap" could result from its decision, and it noted that Congress has the authority to address any such problem. The Court did not say and surely did not imply, as Petitioner and its tribal *amici* seem to assume, that in fashioning a remedy Congress could act without regard to constitutional constraints, specifically equal protection and due process guarantees.

2. Certain members of Congress rushed into the breach to "fix" *Duro*, but it cannot be said the ICRA amendments endured congressional scrutiny prior to enactment. Instead, they were attached as a rider to the 1991 Defense Appropriations Act, Pub. L. No. 101-511, §8077(b)-(d), 104 Stat. 1856, 1892-93 (1990), with the promise of "comprehensive legislation" to follow. Ex post facto hearings took place the following summer at which not a single witness spoke for individual nonmember Indians. Moreover, no "comprehensive legislation" was considered much less enacted. Instead, the emergency language enacted as a stop-gap in 1990 was simply made permanent. Pub. L. No. 102-137, 105 Stat. 646 (1991).

The House Report acknowledged that the statute on which the amendments rely to define "Indian," 18 U.S.C. §1153, "made no distinction regarding the tribal membership of the Indian. The status of non-member Indians . . . was clarified in *United States v. Rogers*, 45 U.S. (How.) 567 (1846) where the Supreme Court held that the statute applied to Indians as a class, not as members of a tribe, but as part of the family of Indians. 45 U.S. 573." The legislative history also notes: "Courts have repeatedly held that the term 'Indian' includes any Indian in Indian Country, without regard to tribal membership. (Citations omitted) [T]he Committee intends to clarify precisely that the inherent powers of Indian tribes includes the authority to exercise criminal misdemeanor jurisdiction over all Indians in Indian country." U.S. Code Congressional and Administrative News, Vol. 2, 102d Congress, 1st Session, 1991 at 375. Senator Tom Daschle, D-S.D., appended a separate statement to the Conference Committee's Report indicating serious concern for the very constitutional issues raised here but agreeing to the report because of the "urgency of this situation." U.S. Code Cong. Admin. News, Vol. 2, 102d Cong., 1st Sess. (1991) at 382-83. The only reason provided by Congress for filing this purported "gap" in jurisdiction in the manner it did was that crimes allegedly committed by nonmember Indians on reservations "are the most tedious crimes with which law enforcement officers deal." *Id.* at 373.

3. According to a 1999 Report by the Department of Interior, there are 556 federally recognized Indian tribes in the United States, with reservations in Maine, Connecticut, New York, Florida, California, Arizona, Alaska, and all points in between. 1999 Indian Labor Force Report, U.S. Department of Interior, Bureau of Indian Affairs Office of Tribal Services.

4. According to the 2000 Census, there are 4,119,301 Indians in the United States, of which, according to the Department of Interior, 1,698,483 are enrolled in a tribe. Notably, the U.S. Census Bureau's definition of an "American Indian" states that it refers to people who have native origins and "who maintain tribal affiliation or community attachment." U.S. Department of Commerce, Economics & Statistics Administration, U.S. Census Bureau, March 2001, Overview of Race & Hispanic Origin. Under Petitioner's argument, this means 1.7 million U.S. citizens are subject to criminal prosecution in tribal courts of which they are not members first and foremost because of their race. But, as demonstrated below, Petitioner's analysis as to who is an "Indian" for purposes of the ICRA amendments lacks merit. Under controlling federal law, one can be an Indian and not be a tribal member. Race is the key, immutable factor. Thus, in fact, the ICRA amendments consigned in excess of 4 million U.S. citizens, because of their race, to non-constitutional prosecution and punishment.[7]

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[7] Counsel for Petitioner and its *amici* supporters uniformly express sanguine regard for the punishment tribal courts mete out for misdemeanor crimes, noting that the punishment is "limited" to "only" one year in jail and a $5,000 fine. This indicates they have not experienced or even faced the realistic prospect of paying thousands of dollars in fines and/or spending a year or indeed a month in jail, any jail. Moreover, it indicates they do not realize or have chosen to ignore the reality that tribal courts, like other courts, can and do "stack" multiple punishments when there are multiple misdemeanors, potentially resulting in fines and jail time in excess of these "minimal" amounts.

SUMMARY OF ARGUMENT

When it enacted the ICRA amendments at issue here, Congress attempted and intended only to "recognize[ ] and affirm[ ]" pre-constitutional inherent sovereign power in Indian tribes that this Court had ruled they do not possess. While this plainly raises constitutional issues, not least of which concern due process and equal protection guarantees, this particular case, because of its procedural posture, may not squarely present such issues. Because the federal court's jurisdiction over this prosecution rests on grounds independent of the ICRA amendments, finding the ICRA amendments either constitutional or unconstitutional in this case may not affect the precise issue presented: whether the Double Jeopardy clause prevents the federal prosecution from going forward or not.

If the Court addresses the troubling equal protection and due process issues presented by the ICRA amendments, Morrises argue they must be found to violate both fundamental guarantees. The amendments on their face rely on a racial classification. The fact that every person swept into tribal criminal jurisdiction is, by his or her race, an Indian, demonstrates that this is a racial, not a "political" classification. No compelling federal interest justifies this, and the amendments are not narrowly tailored. Viable alternatives that do not require a racial classification exist. Congress could either expressly empower states to prosecute misdemeanor crimes allegedly committed by all nonmembers or require federal authorities to do so. While these remedies may be unpalatable to the politically powerful forces that pushed for the ICRA amendments, they demonstrate that Congress was not required to employ this racial classification. Moreover, the

amendments purport to consign U.S. citizens – nonmember Indians – to prosecution and punishment by tribunals of sovereigns which are not bound by the Constitution and which exclude them, because of their ethnicity, from full and equal rights of participation in the political life of the prosecuting tribe. The goal of prosecuting misdemeanor crimes cannot justify the deprivation of rights, within the territorial confines of the United States, that results from subjecting certain citizens, solely because of their race, to non-constitutional criminal tribunals.

ARGUMENT

ALTHOUGH IT DOES NOT APPEAR RESOLVING THE SERIOUS CONSTITUTIONAL ISSUES PRESENTED BY THE ICRA AMENDMENTS IS NECESSARY TO DECIDE THIS CASE, CONGRESS PLAINLY EMPLOYED A RACIAL CLASSIFICATION WHEN ENACTING THEM AND THEY DO NOT WITHSTAND STRICT SCRUTINY; MOREOVER, THE DUE PROCESS DEPRIVATION THAT OCCURS WHEN U.S. CITIZENS ARE SUBJECTED TO NON-CONSTITUTIONAL CRIMINAL PROSECUTION AND PUNISHMENT, MERELY TO ADDRESS MISDEMEANOR CRIMES, CANNOT BE JUSTIFIED.

I. It Is Unclear Whether Equal Protection and Due Process Issues must Be Resolved Here.

A. Without clearly stating so, Petitioner appears to have drafted the Question Presented to encompass whether the acts of Congress at issue here are proof from any constitutional challenge, whether the issue is Double Jeopardy, which is directly presented here, or Fifth Amendment equal protection and due process which are

not clearly raised. The views of Petitioner and *amici* in support of its position, in whole or in part, diverge on this point.

Petitioner, again though not directly raising and addressing the issue of whether this case is appropriate for the Court to analyze the ICRA amendments for compliance with the Fifth Amendment equal protection and due process guarantees, argues that the amendments do not violate equal protection or due process guarantees because, it claims, the explicit racial classification Congress engaged in is, notwithstanding all appearances, "political," and therefore only a rational basis analysis is required. Petitioner's Brief, pp. 34-39.

B. The six *amici* states supporting Petitioner[8] in part, assert that resolution of this case does not require deciding whether the ICRA amendments violate equal protection or due process guarantees. Idaho *Amicus* Brief at pp. 12-17. These *amici* however, persuasively, argue that, should the Court analyze the amendments on those grounds, they should be found unconstitutional. *Id.* at pp. 1-2, 11, 18-28. Idaho, as usual, presents an elegant analysis that would dispose of this case in a simple manner. Noting that since neither the plain words of the ICRA amendments nor the legislative history indicate that Congress intended to delegate federal authority to tribes, as the Court of Appeals held, Idaho argues the Court may halt its analysis at that point because, consequently,

[8] These states are Idaho, Alabama, Louisiana, Nebraska, South Dakota, and Utah. For the sake of clarity, they are referred to hereinafter as "Idaho."

Respondent Lara cannot possibly have a viable double jeopardy claim under established doctrines. *Id.* at pp. 10-11, 12-17. If Idaho is correct, and in light of the specific procedural posture of this case – i.e., a double jeopardy challenge originating in federal court to a federal prosecution following a tribal prosecution – it is difficult to understand how this case can present equal protection and due process challenges to the ICRA amendments. While a ruling on such grounds could invalidate or uphold a tribal prosecution under the ICRA amendments, neither invalidating nor upholding the ICRA amendments on those grounds would have any impact on this subsequent federal prosecution.

C. Notwithstanding that, Petitioner framed the Question Presented in a broad manner – generally asking whether Section 1301, as Congress amended it, "validly restores" the pre-constitutional, inherent sovereign authority this Court held in *Duro v. Reina*, 495 U.S. 676 (1990), tribes no longer possess to prosecute nonmembers who are Indians[9] for misdemeanors they are alleged to have committed on the prosecuting tribe's reservation. In contrast to its ambiguous Question Presented, Petitioner plainly argues the ICRA amendments do not violate equal protection or due process guarantees. Petitioner's Brief at

[9] Morrises respectfully note that Petitioner's statement of the Question Presented does not reflect what Congress actually did when enacting the ICRA amendments. In the ICRA amendments, Congress explicitly subjected "Indians," not "members of other Tribes," as Petitioner puts it, to tribal criminal jurisdiction. Moreover, in defining "Indians" Congress explicitly referred to a statutory definition of "Indians" which this Court has ruled does not refer only to tribal members. *United States v. Rogers*, 45 U.S. (How.) 567 (1846).

pp. 12-13, 34-43. At least as to equal protection, Petitioner's argument hinges on this Court's acceptance of its characterization of the ICRA amendments as an act in which Congress employed a political classification, rather than the racial classification on the face of the text of the amendments.

D. It is not for Morrises to decide and so they will not argue whether the Court can, should or will address whether the ICRA amendments withstand equal protection or due process challenges. But, as revealed by their statement of interest, Morrises have an abiding determination to see the ICRA amendments scrutinized on these grounds matched by well-founded confidence that they will be found lacking. Consequently, they offer this brief in the event the Court decides it is appropriate to address the equal protection and due process flaws in the ICRA amendments as the Petitioner has invited it to.

E. Morrises join with Idaho in pointing out, however, that the acceptance of Petitioner's arguments in support of Congress' attempt to affirm inherent sovereignty which this Court held no longer existed has tremendous consequences for the future of not only the civil rights of Indians but, perhaps, for our constitutional structure resting on the federalism of a durable union of states. Petitioner argues, in rather bland and unrevealing terms, that under the Indian Commerce Clause, Congress may empower tribal governments to exercise non-constitutional, sovereign power over U.S. citizens with no connection to the tribe. Petitioner argues that Congress can take such action to "reaffirm" this power despite this Court's contrary holding, meaning as a practical matter that such congressional action is unreviewable. Because there is no beginning point in the Constitution for such broad,

unreviewable power, Petitioner's approach contains "no logical stopping point." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275-76 (1986). If there are cases where a strong argument can be made that in times of national peril, perhaps, certain rights may be limited in particular ways and as to particular people – though not defined as to their race – policing up misdemeanors is not that type of situation. If it is, there truly is no limit to federal power, at least in Indian country. Because the map of this Nation is spangled with Indian reservations, the rule Petitioner advocates, if accepted, would in due time allow an incredible flowering of federal power, via these reservations, to the great detriment of the states.

II. The ICRA Amendments Violate Equal Protection.

The plain language of the ICRA amendments establishes a racial classification. In Section 1301(2), Congress defined the self-government power of Indian tribes in an explicitly racial manner as "mean[ing] the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." In subsection four, Congress defined "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18. . . . " This language does not on its face limit the sweep of the section to only those Indians who are members of a tribe. This language says nothing about tribal membership whatsoever. Thus, the language of the ICRA amendments, which appears, at least, plain on its face, requires strict scrutiny under this Court's jurisprudence because it establishes a racial classification.

In the face of the plain language of the statute, Petitioner asserts that in fact Congress meant only to subject Indians who are members of some tribe to the criminal jurisdiction of all tribal courts, which, Petitioner claims, makes this classification "political" rather than racial. In that case, according to Petitioner, the amendments need only survive rational basis analysis, which it claims they easily do as a means to keep law and order on reservations. This argument lacks any merit because it has no factual or legal foundation.

First, as a factual matter, when Congress got around to holding hearings on the ICRA amendments after their initial enactment, the legislative history makes it unequivocally clear that it understood that it was subjecting Indians, as a race, not as members of tribes, to tribal criminal jurisdiction. See Statement, *supra*, at paragraph 2. Respected commentators have unequivocally condemned the ICRA amendments for this as violating equal protection. See *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, L. Scott Gould, Vol. 28, No. 1, U.C. Davis L. Rev. 53, 69-75. Professor L. Scott Gould concluded that the so-called *Duro* fix "although conceived by advocates of Indians and supported by Indians themselves, is ill suited to its purpose, *is inherently racist, and should be held unconstitutional.*" *Id.* (Emphasis added.)

Second, as a legal matter Petitioner's "political status" argument lacks any merit. As a matter of federal Indian law, the cases defining who is and who is not an "Indian" for purposes of 18 U.S.C. §1153, including the seminal

case, cited in the House Report, *United States v. Rogers*, 45 U.S. (How.) 567 (1846), make it clear that one need not be a tribal member to be an "Indian" for purposes of criminal prosecution under that statute. Those cases make it clear that one can be an "Indian" for purposes of 18 U.S.C. §1153, and therefore the ICRA amendments, without being a member of a tribe. *United States v. Broncheau*, 597 F.2d 1260, 1262-63 (9th Cir. 1979) ("Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative."); *United States v. Ives*, 504 F. 2d 935, 953 (9th Cir. 1974) ("[E]nrollment or lack of enrollment is not determinative of . . . status as an Indian."); *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir. 1938) ("The lack of enrollment . . . is not determinative of status. Only Indians are entitled to be enrolled . . . and the fact of enrollment would be evidence that the enrollee is an Indian. But the refusal of the Department of Interior to enroll a certain Indian as a member of a certain tribe is not necessarily an administrative determination that the person is not an Indian."); *United States v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976) ("The definition of exactly who is and who is not an Indian is very imprecise. (Citation omitted.) Courts have generally followed the test discussed in *United States v. Rogers*, 45 U.S. (4 How.) 567, (1846): in order to be considered an Indian, an individual must have some degree of Indian blood and must be recognized as an Indian.") Thus, since, 1846, the one immutable requirement to be an "Indian" for purposes of the statutory definition on which Congress relied is an immutable racial characteristic: the person's race must be, at least in part, Indian. *United States v. Rogers*, 45 U.S. 67, 4 How. 567, 572-73, 11 L.Ed. 1105 (1845). (By adoption into a tribe a non-Indian does not become an Indian.)

Most importantly, however, for this Court's equal protection jurisprudence and this country's maintenance of the progress it has made on that principle, it must be acknowledged that Petitioner's "political classification" argument is at best superfluous. Even if Congress limited the class of people it subjected to tribes' pre-constitutional criminal jurisdiction to tribal members (i.e., depriving "only" 1.7 million citizens of their rights rather than 4 million) every single one of those people would be an "Indian" by race. Not one non-Indian would suffer that treatment. At the very best, in that case, the person's membership in a tribe would be an additional factor, but race would be the one indispensable and obviously immutable characteristic of the class of U.S. citizens given such "special treatment."[10]

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[10] This ominous phrase is reminiscent of other racially discriminatory schemes. To paraphrase a recent argument of a well-respected Supreme Court advocate, submitted to the Court while in private practice,

> "Respondent's attempts to justify the [Congress'] race-based [classification] are disturbingly reminiscent of the 'Blood Protection' and 'Citizenship' laws adopted as part of the infamous Nuremburg Laws. Just as [Congress' classification] requires definitions of ['Indian'] according to blood quantum and the race of one's ancestors, the Nuremberg laws restricted the right to vote of persons with 'Jewish blood,' and contained detailed definitions of 'Jew' and 'mixed Jewish blood.' See 1 The Holocaust: Legalizing the Holocaust, The Early Phase, 1933-1939 at 23, 24, 31-32 (John Mendelsohn & David S. Detwiler eds., 1982); *Fullilove v. Klutznick*, 448 U.S., 534 n.5 (1980) (Stevens, J., dissenting) (quoting Nuremburg laws); cf. *Loving*, 338 U.S. at 5 n.4 (Virginia miscegenation laws defined 'white persons' as persons who have 'no trace whatever of any blood other than Caucasian,' and 'colored persons' as '[e]very person in whom there is ascertainable any

(Continued on following page)

In view of this, the ICRA amendments raise fundamental constitutional issues and should be analyzed as any other equal protection case is. As the Petitioner argued, successfully, not long ago in *Rice v. Cayetano*, 528 U.S. 495 (2000), the Constitution, in this case the Fifth Amendment,

> "requires strict scrutiny of all state-sponsored racial classifications, and invalidates those that are not narrowly tailored to achieve a compelling state interest. *Hunt v. Cromartie*, [526 U.S. 541 (1999)], *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496-97 (1989). Such classifications are 'immediately' and 'inherently' suspect (*Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Miller v. Johnson*, 515 U.S. 900, 904 (1995) (citation omitted)), because '[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Where, as

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> Negro blood'); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 633 n.1 (1990) (Kennedy, J., dissenting) ('Other examples are available. See Population Registration Act No. 30 of 1950, Statutes of the Republic of South Africa 71 (1985).')."

As Mr. Olson there said:

> "These notions – that individuals should be judged by their ['Indian blood,'] 'Jewish blood,' 'Negro blood,' and the like – are the inevitable consequence of respondent's approach, and are entirely alien to our Constitution. 'Indeed, the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals.' *Fullilove*, 448 U.S. at 534 n.5 (Stevens, J., dissenting)."

Mr. Theodore B. Olson, Petitioner's Brief, page 27, note 11, in *Rice v. Cayetano*, 528 U.S. 495 (2000).

here, race discrimination is apparent on the face of the statute, '[n]o inquiry into legislative purpose is necessary.' *Shaw v. Reno*, 509 U.S. 630, 642 (1993)." Brief for Petitioner at 28-29, *Rice v. Cayetano*, filed May 27, 1999, Mr. Theodore B. Olson, counsel of record.

Morrises cannot hope to improve upon the framework for analyzing statutes such as the ICRA amendments that on their face raise equal protection concerns set out by the successful Petitioner in *Rice v. Cayetano*, *supra*:

> "'[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.' *Shaw v. Reno*, 509 U.S. at 643-44 (citation omitted). '[W]henever the government treats any person unequally because of his or her race, that person suffered an injury that falls squarely within the language and the spirit of the Constitution's guarantee of equal protection.' *Adarand*, 515 U.S. at 229-230. Thus, a government may impose racial classifications only as a 'last resort.' *Croson*, 488 U.S. at 519 (Kennedy, J.). An interest is 'compelling' only when it rests on a 'strong basis in evidence' that government action favoring one race over another is both 'necessary' and 'legitimate.' *Croson*, 488 U.S. at 493, 500; *Adarand*, 515 U.S. at 226, 228, 236. Similarly, a classification is 'narrowly tailored' only when a government has no other choice – when it legitimately has attempted or considered alternative means and determined that they do not or cannot succeed. . . . " *Id.* at 30.

Applying this analysis here, the plain language of the statute, the operation of the statutory definition on which it relies, and the legislative history all demonstrate the ICRA amendments are, and were intended to be, a burden to only one race. As such, they violate equal protection.

III. The ICRA Amendments Violate the Fundamental Fifth Amendment Right to Due Process Because They Subject U.S. Citizens to Trial and Punishment, Including Possibly Incarceration, by Sovereign Governments Within the Territory and Subject to the Power of the United States but Not Required to Comply with Constitutional Guarantees.

Only in narrowly defined and extraordinary circumstances may the United States prosecute citizens of the United States in tribunals not required to accord the defendant all the protections of the Constitution and its amendments. *Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957). The need or desire to prosecute misdemeanor defendants cannot represent such circumstances. Yet the ICRA amendments, leaving aside for the moment their racially discriminatory aspect, clearly, knowingly subject U.S. citizens to the power of sovereigns unconstrained by the Constitution. This power is real. Tribes may fine a convicted defendant up to $500.00 and imprison him for up to a year in tribal jail for each offense. Even the power of Congress over Indians is limited by their rights as U.S. citizens.

> "Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right. Cf. *Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957). We have approved delegation to an Indian tribe of the authority to promulgate rules that may be enforced by criminal sanction in federal court, *United States v. Mazurie*, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975), but no delegation of

> authority to a tribe has to date included the power to punish non-members in tribal court. We decline to produce such a result through recognition of inherent tribal authority."

Duro v. Reina, 495 U.S. 676, 110 S.Ct. 2053, 2063-2064 (U.S.Ariz. 1990).

Simply put, Congress cannot constitutionally authorize a political entity within the confines of the United States and under its control to exercise criminal jurisdiction over U.S. citizens without according them the full panoply of basic constitutional rights. First among these are the rights of political participation, i.e., consent, from which all other government power flows. See *Duro*, 110 S.Ct. at 2064, citing *Reid v. Covert*, 354 U.S. 1 (1957).

As a U.S. citizen, Thomas Morris has a constitutional right to be tried, when accused of a crime as he is now, by courts that comply with the law of the land. The tribal Court does not, nor is it required to. It is unfathomable, then, that Congress could simply ignore Morris's rights as a U.S. citizen and subject him to such a tribunal.

CONCLUSION

The Petitioner's approaches to due process and equal protection invite all manner of laws that would increase the racial balkanization of America, at least in Indian country. Congress' selection of Indians for adverse "special treatment" by non-constitutional criminal tribunals is inconsistent with more than a century of painful lessons taught by the Civil War and by this Court's carefully wrought interpretation of the constitutional amendments

that followed it and of the Fifth Amendment. If our Nation's struggles with race discrimination have taught one lesson, it is that when we distort the Constitution in the service of or to the detriment of one race, we do the gravest injustice to our Nation, and to the people. The ICRA amendments should be held to violate the Fifth Amendment's due process and equal protection guarantees.

Respectfully submitted,

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[SEAL] **U.S. Department of Justice**
Criminal Division

Washington, D.C. 20530

April 17, 2001

Honorable Cathy Catterson
Clerk, United States Court of Appeals
For the Ninth Circuit
95 Seventh Street
San Francisco, CA 94105

Re: *Morris* v. *Tanner,* No. 99-36007
Argued and Submitted 3/8/01
Rule 28(i) Letter

Dear Ms. Catterson:

Would you kindly bring this letter to the attention of the panel in this case.

In the government's amicus brief in this case, at page 31, we cited to *Nofire* v. *United States*, 164 U.S. 657, 661-662 (1897), for the proposition that a non-Indian by ancestry was an "Indian" for criminal jurisdiction purposes when he was adopted by an Indian tribe. On closer inspection, *Nofire* does not stand for that proposition. *Nofire* involved a special federal statute that granted the Cherokee Nation exclusive jurisdiction over cases where all parties were members of the tribe, including specifically, adopted members, notwithstanding the existence of federal jurisdiction. See 164 U.S. at 658; *Alberty* v. *United States,* 162 U.S. 499, 502 (1896). The general rule is that a non-Indian cannot, through his adoption by a tribe, define himself as an "Indian" for purposes of determining federal criminal jurisdiction. See *Duro* v. *Reina*, 495 U.S. 676, 694 (1990), citing *United States* v. *Rogers*, 45 U.S. 567 (1846). Nevertheless, "*Indian*" status for purposes of federal

criminal jurisdiction requires voluntary membership or affiliation with a federally recognized tribe. See *LaPier* v. *McCormick*, 986 F.2d 303, 305 (9th Cir. 1992); *United States* v. *Heath*, 509 F.2d 16, 19 (9th Cir. 1974); see generally S. Rep. 102-168, 102nd Cong., 1st Sess. App. C, pp.48-54 (1991) (legislative history of 1990 ICRA amendment). For equal protection purposes, this makes Congress' classification of "Indians" for federal criminal jurisdiction purposes one based on political affiliation with a tribe, not one based on race. See *United States* v. *Antelope*, 430 U.S. 641, 645-650 (1977).

In the 2000 Census, 4,119,301 persons identified themselves as being at least partly American Indian or Alaska Native. See Census 2000 Brief, Overview of Race and Hispanic Origin, p. 8, Table 6 (U.S. Dept. of Commerce, Economics and Statistics Administration U.S. Census Bureau March 2001) (copy attached). As of 1999, the total enrollment of the 556 federally recognized tribes (including recognized Alaskan Native Groups) was 1,698,483 persons. See 1999 Indian Labor Force Report p. i, (U.S. Department of the Interior, Bureau of Indian Affairs Office of Tribal Services 1999) (copy attached).

Respectfully submitted,

/s/ Richard A. Friedman

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELIZABETH S. MORRIS, gal, THOMAS LEE a minor child by and through his guardian, his natural parents; RONALD J. MORRIS, SR., gal, THOMAS LEE a minor child by and through his guardian, his natural parents,

Plaintiffs-Appellants,

v.

TANNER, Judge, Judge of the CONFEDERATED SALISH and KOOTENAI INDIAN TRIBAL COURT for the FLATHEAD RESERVATION,

Defendant-Appellee.

No. 99-36007

D.C. No. CV-99-82-DWM

MEMORANDUM*

(Filed Jul. 24, 2001)

Appeal from the United States District Court
District of Montana
Donald W. Malloy, District Judge, Presiding

Argued and Submitted on March 8, 2001
Seattle, Washington

Before: PREGERSON, THOMAS, and GOULD, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Plaintiff-appellant Thomas Lee Morris ("Morris"), by and through his guardians and natural parents, Elizabeth S. Morris and Ronald J. Morris, Sr., brings this declaratory and injunctive relief action challenging the constitutionality of the 1990 amendments to the Indian Civil Rights Act ("ICRA") (hereinafter referred to as the "1990 amendments" or the "1990 ICRA amendments").

Morris is an enrolled member of the Minnesota Chippewa Tribe, Leech Lake Reservation, Minnesota. He is not a member of the Confederated Salish & Kootenai Tribes of the Flathead Reservation (the "Confederated Tribes"). On June 13, 1999, Morris was driving a car near Ronan, Montana, within the territory of the Confederated Tribes, when a Ronan City Police officer cited Morris for speeding and ordered him to appear in the Flathead Reservation Tribal Court ("Tribal Court"). Morris appeared in the Tribal Court, entered a plea of not guilty, and filed a motion to dismiss the complaint against him. His motion was denied by the defendant, Judge Tanner, of the Confederated Tribes.

Morris next filed the present action in federal district court, seeking a declaration that the Confederated Tribes lack criminal jurisdiction over him because he is an Indian who is a member of another tribe (a "non-member Indian"). Morris also seeks an injunction prohibiting the Confederated Tribes from continuing to exercise criminal jurisdiction over him in light of his non-member Indian status.

The district court dismissed Morris's complaint on the ground that the 1990 ICRA amendments permit tribes to exercise criminal jurisdiction over non-member Indians. In so ruling, the district court did not address Morris's

allegations in the complaint that the 1990 amendments violate the equal protection component implicit in the Due Process Clause of the Fifth Amendment, and the principle of separation of powers. Morris timely appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we reverse.

I.

The District Court Erred In Granting Defendant's Motion to Dismiss Without Addressing the Constitutional Issues Raised in the Complaint

As set forth above, in granting the defendant's motion to dismiss, the district court found only that the 1990 amendments permit the Confederated Tribes to exercise criminal jurisdiction over non-member Indians such as Morris. The district court did not address Morris's assertions in the complaint that the 1990 amendments themselves are constitutionally infirm, because they violate his right to equal protection and the principle of separation of powers.[2]

[2] Specifically, Morris's complaint includes four causes of action through which he seeks the following relief: (1) a declaration that the Tribal Court lacks inherent criminal jurisdiction over Morris, a non-member Indian; (2) a declaration that regardless of whether the Tribal Court's criminal jurisdiction over Morris derives from the 1990 amendments or federal common law, the exercise of that authority violates Morris's right to due process; (3) a declaration that regardless of whether the Tribal Court's criminal jurisdiction over Morris derives from the 1990 amendments or federal common law, the exercise of that authority violates Morris's right to equal protection; and (4) a declaration that the 1990 amendments are unconstitutional because they violate the principle of separation of powers. In conjunction with each of these requests for declaratory relief, Morris also seeks an injunction

(Continued on following page)

The fact that the district court erred in dismissing the complaint without addressing the alleged constitutional violations, however, does not mean that we must reverse the district court's decision granting the defendant's motion to dismiss. Under the law of this circuit, we may "affirm the district court's dismissal for failure to state a claim on any basis fairly supported by the record." *Kimes v. Stone,* 84 F.3d 1121, 1126 (1996) (citing *Janicki Logging Co. v. Mateer,* 42 F.3d 561, 564 (9th Cir. 1994)). Thus, we must consider whether the district court's decision dismissing Morris's complaint is otherwise supported by the record. If the record supports the dismissal of Morris's complaint, then the district court's error in failing to address Morris's constitutional claims was harmless.

II.

The District Court's Dismissal of Morris's Complaint Was Not Harmless Error

The defendant suggests two reasons why the district court's decision to dismiss Morris's complaint amounts to harmless error. First, the defendant argues that under the ICRA, Morris may only challenge the constitutionality of the Confederated Tribes' exercise of criminal jurisdiction over him by means of a habeas petition rather than through the present action for declaratory and injunctive relief. Second, the defendant argues that Morris's constitutional claims lack merit because the Confederated Tribes' exercise of criminal jurisdiction over Morris is not subject

prohibiting the Tribal Court from exercising criminal jurisdiction over him.

to the constraints of the Constitution. Because both of these arguments lack merit, we find that the district court should have reached the merits of Morris's constitutional claims.

First, Morris may properly challenge the constitutionality of the 1990 amendments in the present suit for declaratory and injunctive relief. The defendant correctly notes that under the ICRA, 25 U.S.C. § 1303, a habeas petition is the "exclusive means for federal-court review of tribal criminal proceedings." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 67 (1978) (interpreting 25 U.S.C. § 1303 to mean that there is no implied right of action in federal district court for declaratory and injunctive relief under the ICRA). However, Morris's case is framed not as a challenge to the jurisdiction of the tribal court, but rather as a challenge to an act of Congress. As Morris explains, "[t]he issue is not whether Tribes are subject to constitutional limitations and judicial review but whether Congress is."

By framing his argument as a challenge to an act of Congress, Morris avoids the remedial constraints of 25 U.S.C. § 1303. Although *Santa Clara Pueblo* held that under 25 U.S.C. § 1303 there is no implied right of action for declaratory and injunctive relief to enforce the substantive provisions of the ICRA, 436 U.S. at 51-52, Morris does not bring this suit pursuant to the ICRA. Rather, this suit arises under the court's federal question jurisdiction to review the constitutionality of congressional legislation. *See* 28 U.S.C. § 1331. Therefore, 25 U.S.C. § 1303 does not prevent the district court from reaching the merits of Morris's constitutional claims.

The defendant's second argument – that Morris's constitutional claims lack merit because the Confederated Tribes' exercise of criminal jurisdiction over Morris is not subject to the constraints of the Constitution – is similarly unavailing. Under our recent decision in *United States v. Enas,* 2001 WL 726669 (9th Cir. 2001), it is undisputed that the Confederated Tribes could not presently exercise criminal jurisdiction over Morris, a non-member Indian, in the absence of the 1990 amendments. The 1990 amendments may therefore be characterized as *enabling* the Confederated Tribes's exercise of criminal jurisdiction over Morris. This enabling legislation is subject to constitutional review and must comport with the equal protection component of the Fifth Amendment and the principle of separation of powers. Therefore, because Morris has framed his appeal as an attack on the constitutionality of the 1990 amendments rather than as an attack on the constitutionality of the Confederated Tribes's exercise of criminal jurisdiction, the district court must reach the merits of Morris's constitutional claims.

III.

The Question Whether the 1990 ICRA Amendments Violate the Principles of Equal Protection and Separation of Powers is Remanded to the District Court to Consider in the First Instance

Because the district court dismissed Morris's complaint without addressing the constitutional issues raised therein, we remand this matter to the district court to consider in the first instance whether the complaint adequately states a claim for relief. Thus, the district court must consider the question whether the 1990 ICRA

amendments violate the equal protection component of the Fifth Amendment or the principle of separation of powers.

In considering whether the 1990 amendments violate the Fifth Amendment,[3] the district court should consider whether the term "Indian" as used in the 1990 amendments amounts to a political or racial classification. If the district court finds that the classification is racial, it should also consider whether the 1990 amendments satisfy strict scrutiny. If the district court finds that the classification is political, it should also consider whether the 1990 amendments satisfy rational basis review. The district court should further consider the reach of the 1990 amendments, and whether the amendments apply to "Indians" who are not enrolled in, or otherwise affiliated with, any tribe. In connection with these inquiries, the district court may wish to hold a hearing to further develop the factual record.

The district court should consider Morris's claim that the 1990 amendments violate the principle of separation of powers in light of our recent decision in *United States v. Enas*, 2001 WL 726669 (9th Cir. 2001).

IV.

Conclusion

For the reasons set forth above, the district court's decision granting the defendant's motion to dismiss for

[3] It is not clear whether Morris's complaint includes a due process claim that is separate from his equal protection claim. The district court should also consider this issue on remand.

failure to state a claim is reversed, and the matter is remanded to the district court for further proceedings consistent with this disposition. The panel shall retain jurisdiction over this case.

REVERSED AND REMANDED.

TITLE I

CHAPTER 1

CONSTITUTION AND BYLAWS

Part 1

Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, as Amended

Article II

Section 2. Present Membership. Membership in the Tribes on and after the date of the adoption of this amendment shall consist of all living persons whose names appear on the per capita roll of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, as prepared for the per capita distribution as shown on the per capita roll paid in February 1959 together with all children of such members, born too late to be included on such per capita roll and prior to the effective date of this section who posses one-fourth (¼) or more Salish or Kootenai Blood or both and are born to a member of the Confederated Tribes of the Flathead Indian Reservation. Subject to review by the Secretary of the Interior, The Tribal Council shall make any necessary corrections in this 1959 membership roll so that no one eligible for membership under prior constitutional provisions shall be excluded therefrom.

Section 6. Definitions. Wherever the term "Indian Blood" shall have been used herein or in tribal ordinances, unless the context shall require a different meaning, it shall be determined to mean the blood of either or both the Kootenai or the Salish Tribes of the Flathead Reservation.

Law and Order Code of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, 2003

Part 2. Tribal Court Judges:

1-2-202. Appointment, staggered terms, and advertisement. (1) Each Tribal Court Judge shall be appointed by a majority of a quorum of the Tribal Council for a term of four years. Any applicable term shall begin on October 1 of the Calendar year. The terms of the Tribal Court Judges shall be staggered in relation to each other.

* * *

(5) A person shall be eligible to serve as a Tribal Court Judge only if the person (i) is a member of the Confederated Salish and Kootenai Tribes, and (ii) has never been convicted of a felony, or, within one year then last past, of a misdemeanor, with the exception of minor traffic violations.

* * *

Part 6. Juries and Witnesses:

1-2-601. Composition of venire. The Tribal Council each year shall prepare a list of eligible jurors. Such eligible jurors shall be residents of the Flathead Reservation and enrolled members of the Tribes who are qualified to vote in elections of the Council.